Office-Supreme Court, U.S.
FILED
AUG 19 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1511

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF CALIFORNIA, *et al.*,
Cross-Petitioners,

v.

JAMES G. WATT, *et al.*,
Cross-Respondents.

BRIEF OF CROSS-RESPONDENTS WESTERN OIL & GAS ASSOCIATION, *ET AL.*

HOWARD J. PRIVETT
DONNA R. BLACK
MCCUTCHEN, BLACK, VERLEGER & SHEA
600 Wilshire Boulevard
Los Angeles, CA 90017
(213) 624-4200

E. EDWARD BRUCE*
BOBBY R. BURCHFIELD
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Post Office Box 7566
Washington, D.C. 20044
(202) 662-6000

Attorneys for
WESTERN OIL & GAS ASSOCIATION, *et al.*

*Counsel of Record

QUESTION PRESENTED

Whether the Ninth Circuit correctly determined, under Section 307(c)(1) of the Coastal Zone Management Act, 16 U.S.C. § 1456(c)(1), that the federal government, not the States, has ultimate authority to determine whether the selection of Outer Continental Shelf tracts for leasing is, "to the maximum extent practicable, consistent" with a state CZMA program?

PARTIES TO PROCEEDINGS BELOW

The parties to this proceeding are described in the brief filed by the Western Oil and Gas Association, *et al.* (WOGA), as petitioners in No. 82-1327. (WOGA Br. i).

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. CROSS-PETITIONERS IMPROPERLY ATTEMPT TO LIMIT THE QUESTION ACCEPTED BY THIS COURT FOR REVIEW	4
II. HAVING DECIDED THAT OCS LEASE SALES ARE "ACTIVITIES DIRECTLY AFFECTING" THE COASTAL ZONE, THE NINTH CIRCUIT PROPERLY CONSIDERED THE IMPLICATIONS OF THAT DECISION FOR THE CONDUCT OF THE OCS PROGRAM	5
A. California's Complaint And The Position It Took In The Administrative Process Required The Lower Courts To Decide Whether The State's Construction Of The CCMP Would Bind The Federal Government	5
B. The District Court's Final Judgment Was Premised On California's Ultimate Authority To Regulate OCS Leasing	6
C. All Parties Briefed The Case In The Court Of Appeals On The Understanding That It Involved The Substantive Issue Of State Authority Over OCS Leasing, Not Merely The Preparation Of A Consistency Determination	7
D. The Test For Ripeness Established By *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), Is Met In This Case	9
E. Cross-Petitioners' Speculation That The Issues In This Case May Be Resolved Without Further Litigation Does Not Destroy The Ripeness Of The Section 307(c)(1) Substantive Issue	13

Table of Contents Continued

Page

III. THE NINTH CIRCUIT CORRECTLY DECIDED THAT THE FEDERAL GOVERNMENT HAS FINAL AUTHORITY TO DETERMINE CONSISTENCY 15

A. Under Conventional Principles Of Administrative Law, The Federal Action Agency Has The Responsibility, Subject To Judicial Review, To Determine Issues Of CZMA Compliance 18

B. The Ninth Circuit Properly Determined That The Secretary Of the Interior Could Take Account Of Future Opportunities To Apply State CZMA Programs At Later Stages Of OCS Projects In Making A Consistency Determination At The Leasing Stage 21

C. The Ninth Circuit Correctly Recognized That Section 307(c)(1) Permits The Department Of The Interior To Determine Consistency At The Leasing Stage Of An OCS Project 25

1. The Ninth Circuit decided the "maximum extent practicable" issue with full awareness of NOAA's definition of this term . 27

2. The NOAA "maximum extent practical" regulation does not require a federal agency to adhere to a state agency's view of consistency 28

3. Nothing in the CZMA or other NOAA regulations requires a federal agency to comply with one of the many possible interpretations that a state agency might later choose to impose upon a CZMA program's general policies 30

4. The policy issues raised by the application of the CCMP to OCS leasing were not resolved when the program was federally approved 33

CONCLUSION 35

TABLE OF AUTHORITIES

CASES: Page

Abbott Laboratories v. *Gardner*, 387 U.S. 136 (1967) 2, 9, 10

American Petroleum Institute v. *Knecht*, 456 F. Supp. 889 (C.D. Cal. 1978), *aff'd*, 609 F.2d 1606 (9th Cir. 1979) 35

California v. *Watt*, 668 F.2d 1290 (D.C. Cir. 1981) . 19, 36

Citizens to Preserve Overton Park, Inc. v. *Volpe*, 401 U.S. 402 (1971) 19, 20

Communist Party v. *SACB*, 367 U.S. 1 (1961) 13

Conservation Law Foundation v. *Andrus*, 623 F.2d 712 (1st Cir. 1979) 23

County of Suffolk v. *Secretary of the Interior*, 562 F.2d 1368 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978) 19, 21, 22

Industrial Union Department, AFL-CIO v. *American Petroleum Institute*, 448 U.S. 607 (1980) 11, 12

INS v. *Chadha*, ___ U.S. ___, 103 S. Ct. 2764 (1983) 13

Massachusetts v. *Andrus*, 594 F.2d 872 (1st Cir. 1979) 19

Massachusetts v. *Watt*, No. 83-1258 & 83-1265 (1st Cir.) 32

Miranda v. *Arizona*, 384 U.S. 436 (1966) 13

North Slope Borough v. *Andrus*, 642 F.2d 589 (D.C. Cir. 1980) 17, 21, 23

Permian Basin Area Rate Cases, 390 U.S. 747 (1968) . 11

Roe v. *Wade*, 410 U.S. 113 (1973) 13

TVA v. *Hill*, 437 U.S. 153 (1978) 17

Village of False Pass v. *Watt*, 18 E.R.C. 2129 (D. Alaska 1983), *appeals pending*, Nos. 83-3990, *et al.* (9th Cir.) 24

Watt v. *Energy Action Educational Foundation*, 454 U.S. 151 (1981) 11

STATUTES:

Administrative Procedure Act,

5 U.S.C. § 701, *et seq.* 3, 19

5 U.S.C. §§ 706(2)(A), (B), (C), (D) 19

Table of Authorities Continued

Page

Coastal Zone Management Act,
§ 304(12), 16 U.S.C. § 1453(12) 29
§ 307(c)(1), 16 U.S.C. § 1456(c)(1) ..... *passim*
§ 307(c)(3)(B), 16 U.S.C. § 1456(c)(3) 17, 30, 34
§ 307(h), 16 U.S.C. § 307(h) 14
Endangered Species Act,
16 U.S.C. § 1531, *et seq.* 3
§ 7(a), 16 U.S.C. § 1536(a) 17
Occupational Safety and Health Administration Act,
§ 3(8), 29 U.S.C. § 652(8) 12
§ 6(b)(5), 29 U.S.C. § 655(b)(5) 12
Outer Continental Shelf Lands Act,
43 U.S.C. § 1331 3
43 U.S.C. § 1344 36
43 U.S.C. § 1345 19
43 U.S.C. § 1802(1) 11
28 U.S.C. § 1254(1) 1

LEGISLATIVE HISTORY:
H. Rep. No. 95-950, 95th Cong., 1st Sess. 164 (1977) . 21
H. Rep. No. 92-1049, 92d Cong., 2d Sess. 20 (1972) 33, 35

RULES AND REGULATIONS:
15 C.F.R. § 930.19 29
15 C.F.R. § 930.32(a) 28, 33
15 C.F.R. § 930.35(a) 34
15 C.F.R. § 930.35(c) 34
15 C.F.R. § 930.39(a) 31
15 C.F.R. § 930.42 32
41 Fed. Reg. 42878, 42881 (September 28, 1976) 31
43 Fed. Reg. 10510 (March 13, 1978) 35

Table of Authorities Continued

Page

MISCELLANEOUS:

U.S. Supreme Court Rule 34(1)(a) 4, 5

K.C. Davis, Administrative Law Treatise § 21.00 (1982 Supp.) 10

Webster's Third International Dictionary of the English Language (Unabridged) (3d ed. 1968) 29

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1511

STATE OF CALIFORNIA, *et al.*,
Cross-Petitioners,

v.

JAMES G. WATT, *et al.*,
Cross-Respondents.

BRIEF OF CROSS-RESPONDENTS WESTERN OIL & GAS ASSOCIATION, *ET AL.*

OPINIONS BELOW

The opinions of the lower courts are described in the brief filed by WOGA in No. 82-1327 (WOGA Br. 1).

JURISDICTION

Cross-petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 307(c)(1) of the Coastal Zone Management Act, 16 U.S.C. § 1456(c)(1) (CZMA), is reprinted at WOCA Br. 2.

STATEMENT OF THE CASE

The statement of the case is fully set out at WOGA Br. 3-15.

SUMMARY OF ARGUMENT

Cross-petitioners improperly attempt to revise the question which they presented in their cross-petition so as to avoid this Court's scrutiny of the merits of that portion of the Ninth Circuit's opinion which they challenge. This tactic, like their ripeness argument, should not deflect this Court's scrutiny of the merits.

Cross-petitioners' argument that the only ripe issue before the Ninth Circuit was whether the Secretary of the Interior should have prepared a consistency determination for Outer Continental Shelf (OCS) Sale No. 53 is inconsistent with the position taken by California in its complaint that the state's views as to consistency should ultimately control the Secretary's selection of OCS tracts. It also ignores the broad relief granted by the district court, which was premised upon the state's exercise of final authority to determine consistency. Finally, cross-petitoners' ripeness argument cannot be reconciled with the position taken by California before the Ninth Circuit that it, not the Secretary, has "final responsibility for management" of all federal activities, insofar as they directly affect the California coastal zone.

Even if California had not thus raised the issue of State substantive authority under the CZMA, the Ninth Circuit would not have erred in addressing the implication of its affirmance of the district court's ruling that Section 307(c)(1) requires the preparation of a consistency determination. Under *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), the issue of authority to determine consistency was ripe for decision, since it involves purely a question of statutory interpretation and since withholding decision would have resulted in hardship to the parties. Cross-petitioners' suggestion that the dispute between California and Interior might be resolved without a

final adjudication of these issues is too speculative to call into question the ripeness of this controversy.

On the merits, WOGA cross-respondents continue to adhere to the view that federal paramountcy over the OCS, as reflected in both the CZMA and the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 (OCSLA), should be maintained by holding that the selection of OCS tracts for leasing does not "directly affect" the coastal zone. But assuming *arguendo* that it does, the Ninth Circuit correctly held that federal authority over the OCS was preserved in other respects by Section 307(c)(1) of the CZMA.

Three separate facets of the Ninth Circuit's holding permit maintanence of at least a measure of that authority. First, under the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.* (APA), courts should exercise only limited judicial review over compliance by a federal agency with the CZMA. Second, consistent with the principle uniformly recognized by the courts in applying the Endangered Species Act, 16 U.S.C. § 1531, *et seq.* (ESA), to OCS projects, the Secretary need not configure a lease sale to preclude all possible future inconsistencies that might arise as development proceeds, but instead need only set the project on a path capable of achieving future consistency. Finally, the requirement of Section 307(c)(1) that federal activities be, "to the maximum extent practicable, consistent" with state CZMA programs does not require federal officials to defer to a state's *post hoc* construction and application of the vague and general terms of its program.

The measure of federal paramountcy preserved by the Ninth Circuit's interpretation of Section 307(c)(1) is clouded and uncertain, and will result in years of litigation over OCS leasing. Thus, the Ninth Circuit's attempt to

preserve a measure of federal paramountcy over the OCS reinforces the conclusion that the Ninth Circuit erred in deciding that Congress intended Section 307(c)(1) of the CZMA to apply in any respect to the Secretary of the Interior's selection of OCS tracts for leasing.

ARGUMENT

I. Cross-Petitioners Improperly Attempt To Limit The Question Accepted By This Court For Review.

Under Rule 34(1)(a), a petitioner may not in its brief on the merits "change the substance of the questions already presented" in the petition for *certiorari*. The cross-petition for *certiorari* in No. 82-1511 set forth this question:

> "Whether the meaning of the phrase 'to the maximum extent practicable,' as used in § 307(c)(1) of the Coastal Zone Management Act of 1972, 16 U.S.C. § 1456(c)(1), is ripe for judicial determination, and, if so, whether the discussion of that term by the Court of Appeals for the Ninth Circuit is correct."

The federal cross-respondents expressed no opposition to the cross-petition. They took the position that, while a reversal of the Ninth Circuit's construction of "directly affecting" in Section 307(c)(1) would moot the portion of the Ninth Circuit's judgment challenged by cross-petitioners, an affirmance would make it "logically appropriate for the Court to examine the practical consequences of that decision, just as the Ninth Circuit did." (Fed. Mem. in No. 82-1511 at 2). The WOGA cross-respondents also conceded that this Court would wish to examine the consequences of an affirmance of the Ninth Circuit's "directly affecting" ruling. (WOGA Opp. in No. 82-1511 at 2-3).

Cross-petitioners now seek to change their question presented by limiting it to a ripeness challenge to that part of the Ninth Circuit's opinion with which they disagree. (Cross-Petrs. Br. i). However, under Rule 34(1)(a), having tendered the merits of the Ninth Circuit's resolution of that issue to this Court in their cross-petition, they are now obliged to accept this Court's merits ruling, should it decide that the issue was properly before the Ninth Circuit.

II. Having Decided That OCS Lease Sales Are "Activities Directly Affecting" The Coastal Zone, The Ninth Circuit Properly Considered The Implications Of That Decision For The Conduct Of The OCS Program.

A. California's Complaint And The Position It Took In The Administrative Process Required The Lower Courts To Decide Whether The State's Construction Of The CCMP Would Bind The Federal Government.

From the very beginning, California has sought relief in this case extending beyond a direction that the Secretary of the Interior prepare a consistency determination. In its complaint, California asked for an order declaring the Secretary in violation of the CZMA because he "refuse[d] to conduct said leasing of the 34 northern tracts in the Santa Maria Basin in a manner consistent with California's Coastal Management Plan [CCMP]." Calif. Complaint p. 32, ¶ 2(a).[1] Moreover, the State fully revealed its position that it has the determinative voice in deciding consistency issues by asking the court to retain jurisdiction over OCS Sale No. 53 until the California Coastal Commission (CCC) "concurs with any consistency

[1] In a separate part of its prayer for relief, California asked the court to require the Secretary of the Interior to prepare a consistency determination. Calif. Complaint p. 33, ¶ 2(c).

determination that the Secretary might make." (Complaint p. 22, ¶ 56).

California's request for an injunction mandating conformity with the CCC's interpretation of the CCMP faithfully reflected the position taken by the State in earlier administrative proceedings. On March 31, 1981, in continuing to challenge the inclusion of the disputed northern tracts in the Santa Maria Basin, the CCC declared that

> "even if Interior issues a determination of consistency as the law requires, the proposed decision is *not* consistent with the CCMP to the maximum extent practicable." (J.A. 113, emphasis in original).

Thus, California clearly declared that it had no interest in receiving a written consistency determination from the Department of the Interior, but instead desired that the Department adhere to California's construction of the CCMP.

B. The District Court's Final Judgment Was Premised On California's Ultimate Authority To Regulate OCS Leasing.

The district court's final judgment in two different respects granted California the relief it sought in its complaint and upheld the position that the CCC's views of consistency were binding upon Interior. First, the district court ordered the federal defendants to "comply with the requirements of the Coastal Zone Management Act by conducting a consistency determination on the tracts at issue and by conducting all activities on these tracts in a manner consistent with California's Coastal Management Plan." (89a).[2]

---

[2] As in WOGA's opening brief in No. 82-1327, citations to the lower courts' opinions are to the pages of the appendix to WOGA's petition for *certiorari*.

Second, the district court granted California's request for injunctive relief nullifying the bids on the disputed Sale No. 53 tracts, without preserving the status quo, as requested by cross-respondents, and providing the Department of the Interior with an opportunity to prepare a consistency determination with respect to those tracts. The district court's decision to grant California the broad nullification relief which it requested can only be understood as an acceptance of California's view that the CCC's determination of the consistency issue would ultimately be controlling.

C. All Parties Briefed The Case In The Court Of Appeals On The Understanding That It Involved The Substantive Issue Of State Authority Over OCS Leasing, Not Merely The Preparation Of A Consistency Determination.

WOGA and the federal cross-respondents emphasized in their briefs to the Ninth Circuit that the district court had embraced a construction of the CZMA which, in effect, vested final authority in state CZMA agencies to control the selection of OCS tracts for leasing. Thus, the first question presented in WOGA's opening brief in the Ninth Circuit was

> "[w]hether the lower court erred in interpreting Section 307(c)(1) of the [CZMA] in a manner that conflicts with the [OCSLA]?" (WOGA 9th Cir. Br. 2).[3]

In developing its argument on that question (*id.* at 14-20), WOGA contended that Section 19 of the OCSLA restricts States to submitting "recommendations" to the Secretary of the Interior regarding the "size, timing or location" of OCS lease sales, and thus "Congress clearly did not contemplate that a state agency, like the CCC,

---

[3] *See also* Fed. Def. 9th Cir. Br. 48-50.

could through its own assessment of the national interest contradict the Secretary's decision." (*Id.* at 17). Indeed, the opening paragraph of the Introduction and Summary of Argument section of WOGA's brief stated that "clearly implicit in the [district] court's holding is the conclusion that state CZMA programs shall control the selection of OCS tracts for leasing." (*Id.* at 11).

In its responsive brief, California recognized that this case involves far more than the preparation of a consistency determination. Its own Statement of Issues included the question "[w]hether application of the Congressional definition of this threshhold [directly affecting] test to Lease Sale No. 53 required that the lease sale comply with the consistency requirements of Section 307(c)(1)." (Cal. 9th Cir. Br. 1).

In support of its position on this question, California asserted that

> "Congress intended to provide coastal states with federally approved coastal zone management programs with a special status; such states were to exercise greater decisionmaking authority regarding the coastal zone, and consequently, as to lease sales." (*Id.* at 52).

In response to what it referred to as "defendants' imagined specter of states relying on their coastal plans to arbitrarily prohibit federal OCS activities," California admitted that under its view of Section 307(c)(1) "the Act assigns final responsibility for management to the states." (*Id.* at 54). It limited federal agency authority to what it described as "significant power over the policy choices that a state incorporates into its coastal management plan," prior to federal approval when it becomes effective for purposes of Section 307(c)(1). (*Id.*). Thus, California's position was that, once a program has been

approved, the State has authority to prohibit federal OCS activities.

Having successfully sought relief from the district court upon a theory of state supremacy over OCS leasing, and having joined issue with the defendants below on the question of the substantive powers given to States by the CZMA, California cannot now attack the Ninth Circuit's decision because it went beyond scrutiny of the district court's requirement for the preparation of a consistency determination. Plainly, by both the nature of the final judgment that was before it and the arguments of the parties, the Ninth Circuit was required to address what it properly identified as "the premise on which [the district court's] order rests" which "appears to be that California's view of consistency ultimately will be controlling." (25a).

D. The Test For Ripeness Established By *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), Is Met In This Case.

Even if the judgment of the district court had not required it to do so, the court of appeals would not have erred in articulating the scope of the authority of the federal and state governments under Section 307(c)(1).

In *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), this Court stated that the "basic rationale" of the ripeness doctrine

> "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the

> fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 148-49.[4]

The two aspects of the ripeness doctrine spelled out in *Abbott Laboratories* support the Ninth Circuit's clarification of the scope of the substantive authority granted to States by Section 307(c)(1).

First, the issue here is preeminently "fit . . . for judicial decision," because it is purely one of statutory interpretation. *See Abbott Laboratories*, 387 U.S. at 149 (issue proper for adjudication because "both sides have approached this case as one purely of congressional intent . . ."). Cross-petitioners assert that further development of the factual record would shed light on this issue (Cross-Petrs. Br. at 17-18).[5] However, as the Ninth Circuit itself recognized, such clarification of factual issues would be relevant to determining whether a particular OCS leasing proposal is, "to the maximum extent practicable, consistent" with a state's CZMA program, not the congressional intent underlying the statute. (24a). The Ninth Circuit expressly disclaimed any adjudication of the particular consistency issue in this case. (*Id.*).

---

[4] "Controversies are ripe for judicial determination when the legal issues are appropriate for courts to decide and when hardship to private parties from lack of decision is substantial." K.C. Davis, *Administrative Law Treatise* § 21.00, at 305-06 (1982 Supp.).

[5] Cross-petitioners assert that publication of a consistency determination would have entailed "DOI's detailed description of the proposed lease sale, the facilities both onshore and offshore that would accompany it, and the effects of these on the coastal zone." (Cross-Petrs. Br. 17). However, as WOGA argued in the Ninth Circuit and as cross-petitioners never disputed, the environmental impact statement (EIS) for Sale No. 53, as well as other portions of the administrative record, set forth all of this information. (WOGA 9th Cir. Br. 37).

Second, had the Ninth Circuit withheld decision on the issue of the allocation of federal and state authority under the CZMA, it would have imposed great hardship on the parties and would have disserved the public interest. Sale No. 53 took place on May 28, 1981. Award of leases on the disputed tracts has already been delayed for more than two years. A refusal to address the substantive issues created by the Ninth Circuit's construction of Section 307(c)(1) would in all likelihood lead to additional years of delay, following the publication of a consistency determination, for the articulation of legal standards to adjudicate its significance. The continued idling of the companies' $44 million bonus bid deposits and the uncertainty about when, if ever, they will be able to conduct any activities on the disputed tracts impose a substantial hardship upon them. Such uncertainty also imposes a hardship on the Department of the Interior in its conduct of the OCS program.[6]

Moreover, Congress has expressed in the OCSLA, and this Court has recognized, the strong public interest in expeditious exploration and development of OCS resources. *See* 43 U.S.C. § 1802(1); *Watt* v. *Energy Action Educational Foundation*, 454 U.S. 151, 154 n.2 (1981). (WOGA Br. 44). Further delay in articulating legal principles to allow early resolution of the legal issues that cloud Sale No. 53 disserves that interest.

The ripeness cases cited by cross-petitioners do not support them. *Industrial Union Department, AFL-CIO*

---

[6] When withholding decision would prolong the proceedings substantially and thus cause harm to the parties or the public interest, this Court has not hesitated to address issues that concern factual matters within the administrative record, even if they have not been considered by the court below. *See Permian Basin Area Rate Cases*, 390 U.S. 747, 823-24 (1968).

v. *American Petroleum Institute*, 448 U.S. 607 (1980), in fact, supports the Ninth Circuit's resolution of the Section 307(c)(1) issue in this case. There, this Court held that the Occupational Safety and Health Administration must comply with Section 3(8) of the Occupational Safety and Health Act, 29 U.S.C. § 652(8) (OSHA), before issuing standards for benzene. Under cross-petitioners' reasoning, that holding disposed of the only ripe issue in the case, because the court could have remanded the case to the Secretary to reassess the need for Section 3(8) standards. However, apparently recognizing the practical necessity for instructing the Secretary as to the requirements of Section 3(8), the court went on to hold that, "before issuing any standard," he should "determine that it is reasonably necessary and appropriate to remedy a significant risk of material health impairment." 448 U.S. at 639.

The Court's further holding in *Industrial Union* that arguments under Section 6(b)(5) of OSHA were unripe highlights the error in cross-petitioners' reliance on that case. Those arguments addressed a different section of the statute, whereas the question in this case which cross-petitioners claim is unripe arises under Section 307(c)(1), the same portion of the statute that the court was forced to construe as a result of its "directly affecting" holding. Moreover, the issue under Section 6(b)(5) was whether the benzene standard actually adopted met the substantive criteria of the Act. The analogous question in this case would arise only after the Secretary had performed a consistency determination.[7]

---

[7] The other cases relied upon by cross-petitioners involved constitutional issues, falling within the admonition that "[n]o rule of practice of this Court is better settled than 'never to anticipate a question of constitutional law in advance of the necessity of deciding

E. Cross-Petitioners' Speculation That The Issues In This Case May Be Resolved Without Further Litigation Does Not Destroy The Ripeness Of The Section 307(c)(1) Substantive Issue.

Cross-petitioners argue that numerous contingencies could occur that would obviate decision of the substantive issue in this case. (Cross-Petrs. Br. 15). Each is highly speculative and thus does not support deferring resolution of this issue.*

First, cross-petitioners suggest that the Department might accept the CCC's view as to consistency, presumably by deleting the disputed tracts. However, the CCC's interpretation of the CCMP as barring leasing of the disputed tracts was grounded in a "national interest" determination that such action was required to protect the southern sea otter. (WOGA Br. 9). The Secretary has already decided under both Section 19 of the OCSLA and the ESA, in a fashion which the lower courts upheld and California no longer challenges, that the national interest would be served by proceeding with the leasing of the disputed tracts (WOGA Br. 12, 14-15), and that the leasing and exploration stages of Sale No. 53 would not jeopardize the sea otter (WOGA Br. 4, 11-12).

California also suggests that the State might modify its position, leading to compromise and agreement upon the

---

it.'" *Communist Party* v. *SACB*, 367 U.S. 1, 71-72 (1961). Moreover, even in cases involving important issues of constitutional law, this Court has, on occasion, gone beyond the recognition of a constitutional right in a given factual context and has declared general rules to guide lower courts. *See e.g.*, *Miranda* v. *Arizona*, 384 U.S. 436 (1966); *Roe* v. *Wade*, 410 U.S. 113 (1973).

* In *INS* v. *Chadha*, ___ U.S. ___, 103 S. Ct. 2764, 2776-77 (1983), this Court refused to hold that the "speculative" availability of "other avenues of relief" to Chadha constituted "a prudential bar to [its] consideration of the constitutional question presented . . . ."

terms for Sale No. 53 without further litigation. This seems very unlikely. As noted, the CCC has specifically found that leasing of the disputed tracts would "*not* [be] consistent with the CCMP," thus indicating that it would adhere to its view no matter what conclusion Interior reached in a consistency determination. (J.A. 113).

Third, cross-petitioners suggest that mediation by the Department of Commerce under Section 307(h) might end the dispute. But the mediation process would benefit from an authoritative construction by the Ninth Circuit or this Court of the scope of Section 307(c)(1). Indeed, the role envisioned by the Ninth Circuit for the Secretary of Commerce is to resolve disputes over application of the CZMA, not its interpretation. (25a).[9]

Finally, even when seeking rehearing with respect to that portion of the Ninth Circuit's opinion with which they disagree, cross-petitioners argued solely that the Ninth Circuit had wrongly decided the merits. Surely, on the record that was before it, with the positions of the parties staked out with the clarity described above (pp. 7-9), the Ninth Circuit did not err in proceeding to ad-

---

[9] The prior history of mediation by the Department of Commerce gives little reason to believe mediation would be successful here. In 1979, California and Interior participated in mediation proceedings before Commerce with respect to OCS Sale No. 48 (Southern California). The subject of that mediation was the general applicability of Section 307(c)(1) to OCS leasing. The General Counsel of the Department of Commerce issued a final mediation report which, by and large, supported California's position on this question. However, the Secretary of Commerce disapproved the mediator's report on the ground that his "resolution" of the issue in favor of California represented a misunderstanding of his function. (Letter from Secretary Klutznick to Michael Fisher, Def. Ex. L-AA, C.R. 19). Thereafter, it was necessary for the courts in this litigation to decide the Section 307(c)(1) issue.

dress the issues which it held were "unavoidably" raised by its holding that a lease sale is an activity "directly affecting" the coastal zone. (21a).

III. The Ninth Circuit Correctly Decided That The Federal Government Has Final Authority To Determine Consistency.

In the final section of their brief (pp. 22-27), cross-petitioners suggest that the lack of ripeness of that portion of the Ninth Circuit's opinion which they challenge led the court to err in holding that the federal government has final authority to decide consistency issues. In advancing this oblique merits argument, cross-petitioners compare the court's interpretation of the phrase "maximum extent practicable" with regulations of the National Oceanic and Atmospheric Administration (NOAA), as well as a portion of the legislative history of Section 307(c)(1).

We, too, have questions concerning reliance upon the "maximum extent practicable" term in the statute as a basis for upholding federal paramountcy over OCS lands. (WOGA Br. 18-20). The arguments which we advanced below with respect to this issue were designed, as they are here, to demonstrate that Congress did not intend that the selection of OCS tracts for leasing was, in any measure, to be subjected to Section 307(c)(1) consistency review.

The Ninth Circuit rejected this argument, holding that this OCS leasing decision is subject to Section 307(c)(1). By virtue of this holding, the court of appeals was forced either to declare that the CZMA had destroyed federal paramountcy over the OCS or to locate such paramountcy elsewhere in Section 307(c)(1). In choosing the latter alternative, the Ninth Circuit relied upon the "maximum extent practicable" qualification to the consistency requirement of the statute.

Our defense of the lower court's decision in this respect must be qualified. But assuming *arguendo* that the selection of OCS tracts for leasing does "directly affect" the coastal zone, the Ninth Circuit clearly was correct in holding that federal paramountcy over the OCS was not destroyed by the CZMA.

Three separate aspects of the Ninth Circuit's construction of the CZMA bearing on the federal paramountcy issue can be extracted from its general reliance upon the phrase "maximum extent practicable." However, properly considered, two of the three are based on considerations which do not depend upon the meaning ascribed to that phrase.

First, the court of appeals held that "final authority to determine whether the required consistency exists . . . . must reside in the Executive Branch of the federal government subject, of course, to such judicial review as is appropriate." (21a). This portion of the court's holding does not depend upon attributing any particular meaning to the term "maximum extent practicable." That term bears upon the standard or degree of consistency which the federal agency must observe. It does not address the question of which organ of government—the federal agency conducting an activity; the state CZMA agency; the Department of Commerce in its mediation role; or a reviewing court—has authority to determine whether the standard has been met.

A second facet of the Ninth Circuit's holding is its recognition that in determining the consistency of OCS lease sales

> "the Secretary of [the] Interior may take into account that further consistency determinations will be made at the exploration, development, and production stages, when more complete information will be

> available. *See* 16 U.S.C. § 1456(c)(3). In other words, the lease sale need not be configured so as to preclude any possible future inconsistency from arising as development proceeds. The Secretary of [the] Interior, however, must set the leasing, development, and production activities on a path that is consistent with the state's plan to the maximum extent practicable in the light of the then available knowledge." (24a).

This, too, does not turn on the meaning of the term "maximum extent practicable." Permitting the Secretary to consider at the early stages of a project that there will be later opportunities for consistency review implies no particular laxity or rigor of the consistency standard.

That this is so is demonstrated by the several appellate decisions applying the unqualifiedly rigorous standard of Section 7(a) of the ESA, 16 U.S.C. § 1536(a),[10] to an OCS project. Those decisions permit Interior to base a "no jeopardy" assessment at the leasing stage of an OCS project upon the assurance that there will be later opportunities during the life of the project for further scrutiny of the jeopardy issue. *See North Slope Borough* v. *Andrus*, 642 F.2d 589, 609 (D.C. Cir. 1980):

> "Mandatory stage-by-stage review prevents the telescoping of any and every projected hazard to endangered life and to the environment into one overwhelming statutory obstacle [at the leasing stage of an OCS project]. The OCSLA standards are not less strict, they simply rely more on achieving compliance than on exacting proscription. By ensuring graduated compliance with environmental and endangered life standards, OCSLA makes ESA re-

[10] *See* TVA v. Hill, 437 U.S. 153 (1978).

> quirements more likely to be satisfied both in an ultimate and proximate sense."

See also pp. 23-24, *infra*.

Finally, the court held that Interior could consider "[s]uch factors as the extent to which leasing, exploration, development, drilling and production would be hampered or proscribed by conformity; the reasonableness of the state plan, as well as the terms of the particular proposed lease sale . . . ." in determining consistency to the "maximum extent practicable." (24a). This part of the Ninth Circuit's opinion does, of course, require scrutiny of this disputed phrase.

Cross-petitioners have advanced nothing in their opening brief to attack the first two of the major underpinnings of the court's ruling against them. Nonetheless, we will demonstrate that the Ninth Circuit correctly resolved the issues underlying these points, as well as the one which cross-petitioners have briefed.

A. Under Conventional Principles Of Administrative Law, The Federal Action Agency Has The Responsibility, Subject To Judicial Review, To Determine Issues Of CZMA Compliance.

Section 307(c)(1) of the CZMA is a directive addressed to federal agencies:

> "Each Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs."

The CZMA contains no citizens suit or other provisions defining the authority of courts to review federal decisions under the statute. That being the case, any lawsuit challenging federal agency compliance with Section

307(c)(1) must be brought under the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.* (APA). *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971). Indeed, the environmental group cross-petitioners invoked the APA to demonstrate their standing to seek judicial review of purported violations of the CZMA. (32a-36a).

Under the APA, as it applies to actions like this one, courts are to determine whether the challenged federal decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or if the action failed to meet statutory, procedural or constitutional requirements." *Overton Park*, 401 U.S. at 414, citing 5 U.S.C. §§ 706(2)(A), (B), (C), (D).[11]

---

[11] The "substantial evidence" review standard of the APA is applicable only to formal rule-making or to actions based on public adjudicatory hearings. 401 U.S. at 414-15. The Secretary of the Interior's disposition of OCS lands does not constitute formal APA rule-making. *California* v. *Watt*, 668 F.2d 1290, 1322 n.154 (D.C. Cir. 1981). Moreover, neither the OCSLA nor the CZMA require the Secretary to take action on the basis of a public adjudicatory hearing. As in *Overton Park*, 401 U.S. at 414, the only "hearing" that precedes an OCS leasing decision is the non-adjudicatory, quasi-legislative hearing which permits comment upon a draft environmental impact statement.

Congress has prescribed the "arbitrary or capricious" standard for judicial review of the Secretary of the Interior's decision to proceed with an OCS lease sale in a fashion contrary to a governor's recommendations. Section 19(d) of the OCSLA, 43 U.S.C. § 1345(d) (*see* WOGA Br. 24-27). Moreover, courts adjudicating other aspects of OCS leasing decisions have uniformly applied the *Overton Park* standard of review. *County of Suffolk* v. *Secretary of the Interior*, 562 F.2d 1368, 1382-84 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978); *Massachusetts* v. *Andrus*, 594 F.2d 872, 892 (1st Cir. 1979).

Accordingly, in judicial review proceedings involving claims under Section 307(c)(1), the federal action agency "is entitled to a presumption of regularity." *Overton Park*, 401 U.S. at 415. The reviewing court asks only whether "the Secretary could have reasonably believed that in this case" he or she had complied with the relevant statute, 401 U.S. at 416,—*i.e.*, here whether the Secretary's action was consistent to the maximum extent practicable with a state CZMA program. Thus, the Ninth Circuit clearly was correct in holding that the federal government has "final authority to determine whether the required consistency exists . . . subject, of course, to such judicial review as is appropriate." (21a).[12]

---

[12] The views of a state agency concerning its CZMA program would be a part of the administrative record before the agency and thus a factor to be considered by a court in determining under the APA whether the federal action agencies' decision was arbitrary or capricious, an abuse of discretion or otherwise not in accordance with law. The weight to be given to those views is a function, at least in part, of the substantive standard against which the federal action agency's views are judicially reviewed. *See* pp. 25-35, *infra*, discussing this standard.

The record made before the Department of Commerce in a mediation proceeding might also be available to a court exercising APA review of a federal agency decision to proceed when confronted with a Section 307(c)(1) consistency claim. However, the Department of Commerce has previously (and we submit correctly) taken the position that its mediation function does not permit it to adjudicate disputes between state and federal agencies. (*See* p. 14 n.9, *supra*). Thus, it does not seem likely that the mediation process would result in a decision by Commerce that would be of assistance to the courts in such judicial review proceedings.

B. The Ninth Circuit Properly Determined That The Secretary Of The Interior Could Take Account Of Future Opportunities To Apply State CZMA Programs At Later Stages Of OCS Projects In Making A Consistency Determination At The Leasing Stage.

The Ninth Circuit's determined that the Secretary of the Interior has the responsibility, at the leasing stage, to set the project "on a path that is consistent with the state plan to the maximum extent practicable in the light of the then available knowledge," so that he need not configure the project, at the leasing stage, "to preclude *any* possible future inconsistency from arising." (24a). This view of applying the CZMA to OCS leasing is compelled by Congress' careful structuring of the OCSLA to ensure that OCS projects are not prematurely aborted due to speculative problems which might, but need not, arise in the future and which can, if they arise, be resolved later.

As recognized by case law both before[13] and after enactment of the 1978 OCSLA amendments,[14] as well as the legislative history of those amendments,[15] it is impossible at the leasing stage of an OCS project to address intelligently all of the environmental impacts which may arise during the 20-30 year life of the project. Prior to conducting an OCS lease sale, it is not known which tracts will be bid upon; which ones will be leased; of those leased, which tracts will be explored; which tracts explored will yield commercially recoverable deposits of hydrocarbons; or which tracts will contain only gas (the production of which creates little, if any, environmental risks). Similar-

---

[13] *County of Suffolk*, *supra*, 562 F.2d 1368 (*see* WOGA Br. 29 n.24).

[14] *North Slope Borough*, *supra*, 642 F.2d 589 (*see* WOGA Br. 34, 45).

[15] H. Rep. No. 95-950, 95th Cong., 1st Sess. 164 (1977) (*see* WOGA Br. 30).

ly, it is not known whether oil, if discovered in commercial quantities, will be transported to shore via pipelines as opposed to tankers; whether onshore facilities will be required to support production and development operations; and, if so, where they will be located.

At the leasing stage, there is also little site-specific information available concerning the environmental resources of the area to be leased. It is infeasible for government or industry to conduct intensive surveys of every possible location for a drilling rig, platform, pipeline or onshore support facility at this point. It is similarly unrealistic to design such facilities at that stage to avoid or lessen impact on such resources. Indeed, one court has described efforts to do so as "a meaningless exercise."[16] It is only after leasing occurs, exploration commences, and later production/development plans are prepared that it becomes feasible to conduct site-specific surveys and then, if particularly vulnerable resources are likely to be impacted, to begin designing safeguards to protect them.[17]

Recognizing the complexity and host of uncertainties associated with an OCS project, Congress segmented the OCS process into a "pyramidic . . . structure," with clear Secretarial authority to ensure that each step provides

---

[16] *County of Suffolk*, 562 F.2d at 1378 (*see* WOGA Br. 29 n.24).

[17] The administrative record in this case reveals that the Department of the Interior has recommended a research program aimed at exploring the possibility of physically translocating sea otters to form a new community in locations that would not be affected by oil spills in the Santa Maria Basin. The Department recited that this effort would cost in the range of $185,000 to $235,000 per year over a three-five year period and, if properly implemented, "could be completed prior to initiation of development and production, thus causing no delay" in the Sale No. 53 project. C.R. 85; A.R. 237w at 2.

for compliance with applicable laws, including the CZMA. It thus required "mandatory stage-by-stage review" to "prevent . . . the telescoping of any and every projected hazard to endangered life and the environment into one overwhelming statutory obstacle" that had to be confronted at the early stages of a project. Congress did this, *inter alia*, to discourage litigation "particularly at the pre-exploration, pre-development leasing stages, where the chances of harm to the environment are slim." See WOGA Br. 44-45 and cases cited therein.

We continue to believe that this argument demonstrates that the selection of OCS tracts for leasing does not "directly affect" a state's coastal zone and thus is not subject to Section 307(c)(1). But assuming otherwise, the argument at the very least supports the Ninth Circuit's articulation of the manner in which Section 307(c)(1) should be applied at the leasing stage.

The considerations which support applying CZMA programs at the leasing stage of an OCS project with full awareness of the applicability of those programs at subsequent stages have prompted courts similarly to apply the ESA to OCS projects. In *Conservation Law Foundation* v. *Andrus*, 623 F.2d 712, 715 (1st Cir. 1979), the court upheld the Department of the Interior's decision to proceed with the leasing stage of an OCS project, in the absence of a biological opinion with respect to the oil-spill related threats of jeopardy to endangered whales. The court justified this interpretation of the ESA on the ground that there would be adequate opportunity, prior to subsequent stages of the project which give rise to the threat of jeopardy, to apply the ESA to protect the species. The D.C. Circuit in *North Slope Borough* v. *Andrus*, *supra*, 642 F.2d at 609, later articulated at length the rationale for this "graduated" compliance with the ESA for OCS projects. *See* pp. 17-18, *supra*.

These cases were followed by the district court in this case when it rejected plaintiffs' ESA claim (82a-85a):[18]

> "Since the specific location, nature and size of facilities that might be necessary during these phases is not yet known, the potential jeopardy to the endangered species posed by these subsequent phases of OCS development was not determined. . . . Both [biological] opinions indicated, however, the necessity of reinitiation of consultation pursuant to § 7 of ESA prior to approval of development/production plans. . . . In light of the restrictions imposed on the FWS and NMFS by the limited quantity of available information, the decision to evaluate only the risks incurred during leasing and exploration and to reinitiate consultation prior to development and production cannot be held unreasonable." (84a) (citations omitted).[19]

These observations apply with equal force to the invocation of the CZMA in this case. Presently nothing is known about the "specific location, nature and size of facilities" that might be used on the challenged northern tracts. And just as with the ESA, there is a clear requirement for reinitiation of CZMA consultation prior to approval of plans for later stages of the project. Thus, the district court's recognition that, under the ESA, "[i]t may not be feasible to prescribe the proper safeguards [for

---

[18] *See also* Village of False Pass v. Watt, 18 E.R.C. 2129 (D. Alaska 1983), *appeals pending*, Nos. 83-3990, *et al.* (9th Cir.).

[19] Cross-petitioners conceded the principle of graduated compliance articulated in the OCSLA/ESA case law by not appealing this portion of the district court's ruling to the Ninth Circuit, even though they did attack the district court's NEPA and OCSLA Section 19 rulings against them. (WOGA Br. 13).

endangered species] until the discrete stage is at hand" (87a) applies equally to the CZMA.[20]

Obviously, the Ninth Circuit was correct in holding that the obligation of the Department of the Interior under the CZMA is to set the project on a path capable of achieving consistency. The Department need not seek to guard against all possible later inconsistencies with state CZMA programs.

C. The Ninth Circuit Correctly Recognized That Section 307(c)(1) Permits The Department Of The Interior To Determine Consistency At The Leasing Stage Of An OCS Project.

The third aspect of the Ninth Circuit's "maximum extent practicable" ruling was its "reject[ion of the district court's] interpretation of the CZMA" as requiring "conformity to the program in the manner deemed appropriate by the state concerned." (21a). Instead, the court of appeals held that the Secretary of the Interior could consider a variety of factors in deciding whether an OCS leasing proposal was, "to the maximum extent practicable, consistent" with a CZMA program. (24a).

In so construing this term, the court of appeals emphasized that it could not "precisely delineat[e]" the degree of conformity required in any particular case. (24a). It stated that "verbal formulas cannot eliminate the necessi-

---

[20] Admittedly, the district court sought to distinguish the ESA from the CZMA, holding that the "ESA does not focus on comprehensive planning." (87a). Without conceding this distinction between the two statutes, the Ninth Circuit correctly held that any "comprehensive planning" aspects of the CZMA can be fully satisfied by applying that statute at the leasing stage with full awareness of the later opportunities for CZMA review at subsequent stages of an OCS project.

ty of examining each situation with care and sensitivity to the concerns of the state and nation." (*Id.*).

California's challenge to this construction of the CZMA must be evaluated against the provisions of the CCMP upon which California has relied in this case. As revealed in our opening brief (WOGA Br. 8-10), those provisions are very general. One of them requires "special protection" for "areas and species of special biological or economic significance," without specifying the degree of protection or the location or nature of the species. Another directs that unidentified "environmentally sensitive habitat areas shall be protected," while the third provides the CCC with authority to override the prior two provisions and permit the location of industrial facilities in the coastal zone, if the "public welfare" would thereby be served.

The CCC extracted from these general provisions the proposition that OCS leasing in the Santa Maria Basin area could not occur within 12 miles of the southern sea otter's habitat. (WOGA Br. 9-10). The CCC did not explain how it defined this buffer zone; the CCC did not suggest either that this zone was dictated by the provisions of the CCMP upon which the CCC relied nor that it was determined on the basis of evidentiary data before the CCC.[21]

---

[21] That no such evidentiary basis for this buffer zone exists is plainly revealed by the administrative record before the Secretary of the Interior. In the process of reconsidering Secretary Andrus' decision to lease all Santa Maria Basin tracts, the Office of Fish, Wildlife and Parks prepared an analysis for Secretary Watt which demonstrated that the general risks posed to the sea otter by potential oil spills during the development/production stage of the Sale No. 53 project would be reduced by only 5-6% as a result of deleting the northern Santa Maria Basin tracts. C.R. 85; A.R. 237w at 2. No findings were articulated by the CCC to dispute this analysis.

The consistency issue posed by the invocation of such provisions of a CZMA program does not require a court to determine the amount of latitude that a federal officer has to depart from a well-defined regulatory standard; the "maximum extent practicable" issue in this context is not comparable to one arising in a zoning variance proceeding. Instead, the issue posed is whether the federal officer can review the explicit terms of the state program in deciding the consistency issue or whether he or she instead must abide by the views of the state CZMA agency which, on a *post hoc* basis, has interpreted the state program to require a halt or specific modifications to the federal activity. When viewed in this light, it is clear that the Ninth Circuit correctly held that the Secretary of the Interior is not bound to conduct OCS leasing activities "in the manner deemed appropriate by the state concerned." (21a).

1. The Ninth Circuit decided the "maximum extent practicable" issue with full awareness of NOAA's definition of this term.

Cross-petitioners argue that, in defining "maximum extent practicable,"

> "the Ninth Circuit was apparently unaware that NOAA had issued a definition of 'maximum extent practicable' in final regulations." (Cross-Petrs. Br. 23).

However, the court of appeals' attention was specifically directed to that regulation during the briefing of the merits.[22]

---

[22] California itself cited the regulatory definition of the term "maximum extent practicable" to the Ninth Circuit:

> "§ 307(c)(1) is a substantive requirement. The section requires that the federal activities be rendered consistent to the 'maximum extent practicable,' which means that they must be 'fully

Moreover, in seeking rehearing below, cross-petitioners argued that the Ninth Circuit had improperly construed the term "maximum extent practicable," in the light of the NOAA regulation and CZMA legislative history. The court denied that petition without comment, thereby indicating that cross-petitioners' discussion of "maximum extent practicable" brought nothing to the court's attention which required it to modify its opinion.

2. The NOAA "maximum extent practical" regulation does not require a federal agency to adhere to a state agency's view of consistency.

NOAA regulations do not support the view that a federal agency has no authority when confronted with an interpretation of a general provision of a state CZMA program, such as underlies California's opposition to Sale No. 53, to reach a decision at variance with the state's construction of its program. Subparagraph (a) of 15 C.F.R. § 930.32(a) provides:

> "The term 'consistent to the maximum extent practicable' describes the requirement for Federal activities including development projects directly affecting the coastal zone of States with approved management programs to be fully consistent with such programs unless compliance is prohibited based upon the requirements of existing law applicable to the Federal agency's operations."

This regulation defines neither the term "consistent" nor the term "management program." Instead, it merely defines "consistent to the maximum extent practicable" as meaning "fully consistent with such programs."

---

consistent.' *See* 15 C.F.R. § 930.32, 44 F.R. 37146." (Cal. 9th Cir. Br. 63).

Indeed, the federal defendants even quoted the operative language of this regulation to the court of appeals. (Fed. 9th Cir. Reply Br. 24).

The ordinary meaning of the term "consistent," as used in the CZMA, refers to something that is

> "marked by agreement and concord [opinions *consistent* with each other]; coexisting and showing no noteworthy opposing, conflicting, inharmonious or contradictory qualities or trends: COMPATIBLE—usu. used with *with* [drinking more hollands and water than is *consistent* with decorum] . . . [is your Aunt's romanticism always *consistent* with accuracy . . .]"[23]

Congress' choice of the term "consistent" implies only that a federal agency should not take action that conflicts with, contradicts or is inconsistent with a CZMA program.

Both the statute[24] and NOAA's regulations[25] define "management program" as a "comprehensive statement in words, maps, illustrations or other media of communications . . . setting forth objectives, policies and standards to guide public and private uses of lands and waters in the coastal zone." Thus, the regulation requires consistency with written objectives, policies and standards. There are many options available to a federal official who seeks to operate in a manner that is "consistent" with objectives, policies and standards as general as the ones relied upon by California here.

---

[23] Webster's Third International Dictionary of the English Language (Unabridged) (3d ed. 1968).

Although the CZMA defines a number of its key terms, 16 U.S.C. § 1453, it contains no definition of the term "consistent."

[24] Section 304(12), 16 U.S.C. § 1453(12).

[25] 15 C.F.R. § 930.19.

3. Nothing in the CZMA or other NOAA regulations requires a federal agency to comply with one of the many possible interpretations that a state agency might later choose to impose upon a CZMA program's general policies.

Section 307(c)(1) stands in sharp contrast to Section 307(c)(3). In the latter statute, Congress specifically provided that a state CZMA agency must concur with the consistency certification made by an applicant for a federal license or permit as a precondition to the grant of that licence or permit.[28]

Having specifically provided States with this role in the CZMA process as it applies to the issuance of federal licences or permits, while remaining silent as to state CZMA agency participation in determining consistency for federal activities, Congress clearly implied that a federal agency assessing a consistency issue was not to be bound by the views of state agencies. The fact that Congress provided for Secretary of Commerce review of state actions under Section 307(c)(3), but provided for no

---

[28] Section 307(c)(3) provides, in pertinent part:

> "No federal official or agency shall grant such person any license or permit for any activity described in detail in such [exploration or development/production] plan until such state or its designated agency receives a copy of such certification [of consistency with a state CZMA program] . . . and until—
>
> "(i) such state or its designated agency, in accordance with the procedures required to be established by such state . . . concurs with such person's certification and notifies the Secretary and the Secretary of the Interior of such concurrence; [or]
>
> * * *
>
> "(iii) the Secretary [of Commerce] finds . . .
>
> "(A) that each such activity which is described in detail in such plan is consistent with the objectives of this chapter or is otherwise necessary in the interest of national security."

such review under Section 307(c)(1), strengthens this implication. As the Ninth Circuit held:

> "It would be anomalous for Congress to have provided the state with final authority unilaterally to nip these activities in the bud, by reason of the application of section 307(c)(1) to lease sales, in the face of its careful scheme in section 307(c)(3) to assure that a state cannot unilaterally stop the activity at later stages." (22a).

When preparing its CZMA regulations, NOAA noted the difference between the role given to state agencies pursuant to Section 307(c)(1) and 307(c)(3), and specifically refused to give States a determinative voice in consistency issues arising under the former section:

> "A number of State reviewers urged NOAA to require Federal agencies to cease action on proposed activities including projects directly affecting the coastal zone which the State agencies determined would not be consistent to the maximum extent practicable with the State's program. While the Act prohibits approval of Federal license and permit activities as well as Federal assistance programs in the event of an objection by the State agency, no similar directive is provided with respect to Federal activities including projects under dispute. Therefore, NOAA cannot require cessation of action in these instances." 41 Fed. Reg. 42878, 42881 (September 28, 1976).[7]

Other aspects of NOAA's regulations demonstrate that federal officials are not inflexibly bound by the construction imposed on a state CZMA program by a state agency. 15 C.F.R. § 930.39(a) requires that a consistency determination be "based upon an evaluation of the rele-

[7] NOAA went on to "strongly encourage" federal agencies not to proceed in the face of state disagreement in order to avoid litigation. (*Id.*).

vant provisions of the management program." The regulation does not suggest that a federal agency must first request or otherwise anticipate the interpretations which a state agency may impose upon the general provisions of the program. Indeed, under the regulatory scheme, 15 C.F.R. § 930.42, state agencies do not even recite their views of consistency until after they have received a consistency determination.

Accordingly, it is clear that a federal officer is not bound by a state agency's construction of the vague and general provisions of its CZMA program. Instead, in determining that a proposed action is consistent "to the maximum extent practicable" the federal agency can base its decision upon its good-faith interpretation of the program.*

---

* The position set forth above is identical to the one set forth by certain industry-intervenors, not including WOGA but including some of the WOGA members that are before this Court, in *Massachusetts* v. *Watt*, Nos. 83-1258 & 83-1265 (1st Cir.). (*See* Cross-Petrs. Br. 19 n.13). There, as here, the industry parties dealt with contentions by a state government invoking its CZMA program that it, not the federal government, has the last word in infusing content into the vague and general terms of the program for the purpose of barring OCS leasing. Also there, as here, the industry parties argued that the plain meaning of the term "consistent" set forth in Section 307(c)(1) and the NOAA regulations does not vest final authority in state agencies to offer binding constructions of their programs.

The industry parties in *Massachusetts* v. *Watt* did not take the position that the construction of the term "consistent" to the "maximum extent practicable" was not ripe in that case, as implied by cross-petitioners. Similarly, nothing said to the First Circuit by those parties implied that the Ninth Circuit had improperly reached the "consistent" to the "maximum extent practicable" issue in this case. To the contrary, the industry parties repeatedly cited to the First Circuit the very aspect of the Ninth Circuit's ruling which cross-petitoners here seek to have reversed.

4. The policy issues raised by the application of the CCMP to OCS leasing were not resolved when the program was federally approved.

Cross-petitioners' attack upon the Ninth Circuit's holding that the Secretary of the Interior is not bound to conform to the CCMP "in the manner deemed appropriate by [California]" (21a) rests, in part, upon an argument that federal agencies are required to consult with the Secretary of Commerce, prior to his approval of a state program, so as to "iron out whatever difficulties" the program appears to create for federal agency programs. (Cross-Petrs. Br. at 25-26, quoting H.R. Rep. No. 92-1049, 92d Cong., 2d Sess. 20 (1972)). Apparently, cross-petitioners hold the view that, since the Secretary of the Interior failed to "iron out" such problems with respect to OCS leasing when the CCMP was approved, he forevermore is bound to operate in a manner fully consistent with the program as it may be interpreted by the State.

As cross-petitioners concede, however, Congress recognized that CZMA programs might not contemplate all future circumstances in which they would be applied, so that a federal agency might later be confronted with a CZMA issue that had not been anticipated at the time of program approval. "For that reason, the Committee [reporting out the CZMA] felt that some leeway should be written into the statute with respect to activities of federal agencies in connection with approved programs." (*Id.* at 26 n.22, quoting H.R. Rep. No. 92-1049 at 20).[25]

---

[25] There is a further reason to extend such "leeway" to the Secretary of the Interior in connection with OCS leasing activities. The legislative history referred to in the text above was written at a time when Section 307(c)(1) was envisioned as applying only to federal activities "in the coastal zone." (*See* Cross-Petrs. Br. 25, quoting H.R. Rep. No. 92-1049; *see also* WOGA Br. 37-38). It may be relatively easy for federal agencies conducting such activities to antici-

Here, there was nothing set forth in the CCMP at the time of federal program approval that announced California's intention to invoke its program for the purpose of challenging the Secretary of the Interior's selection of OCS tracts for leasing. Although NOAA's regulations, 15 C.F.R. § 930.35(a), instruct state agencies that they "should list in their management programs Federal activities which, in the opinion of the State agency, are likely to directly affect the coastal zone and require a Federal agency consistency determination,"[30] California did not so list OCS leasing at the time it secured federal approval of the CCMP.[31] Moreover, when the CCMP was approved in November 1977 (WOGA Br. 6), the issue of whether the selection of OCS tracts for leasing was a federal activity within the meaning of NOAA's regulations was a subject

---

pate later consistency disputes at the time of program approval. However, federal agencies conducting activities which have the attenuated connection to the coastal zone implied by the Ninth Circuit's construction of "directly affecting" are far less likely to anticipate later consistency issues at that time.

[30] 15 C.F.R. § 930.35(c), however, provides that the failure to so list a federal activity does not excuse a federal agency from preparing a consistency determination for an activity which directly affects the coastal zone.

[31] While California did not suggest that its program would apply to OCS leasing, the CCMP did reveal the State's intention to invoke consistency powers under Section 307(c)(3)(B) of the CZMA as to OCS exploration and development plans. (CCMP pp. 93-94, Ex. L-18, C.R. 3). Having emphasized its intention to apply Section 307(c)(3)(B) to the activities of OCS lessees, while remaining silent as to the application of Section 307(c)(1) to Interior's OCS leasing decisions, California clearly implied that its program would not apply to such decisions. For this reason, when WOGA and other industry representatives sought judicial review of the Secretary of Commerce's approval of the CCMP and alleged that it would impede OCS development, they focused solely upon the application of the program

of "disagreement" within the Executive Branch and was "still under consideration by the Administration."[32]

That being the case, there was no "ironing out" of the policy issues presented by the application of the CCMP to OCS leasing at the time of program approval.[33] Accordingly, acceptance of the argument that the Secretary of the Interior must now conduct OCS leasing off California, "in the manner deemed appropriate by the state concerned" (21a), would mean that California would be exercising control over OCS leasing without any federal oversight.[34]

CONCLUSION

As we have demonstrated, the Ninth Circuit was confronted with arguments as to the manner in which the CZMA impaired the exercise of federal paramountcy

---

under Section 307(c)(3)(B) to OCS exploration and development activities. *American Petroleum Institute* v. *Knecht*, 456 F. Supp. 889 (C.D. Cal. 1978), *aff'd*, 609 F.2d 1606 (9th Cir. 1979). Thus, the courts that reviewed the approval of the CCMP never considered its application to the Secretary of the Interior's selection of OCS tracts for leasing.

[32] Promulgation of Final Rules, 43 Fed. Reg. 10510, 10512 (March 13, 1978).

[33] The legislative history of the CZMA makes it clear that it is the Secretary of Commerce's duty to "insure that the state, in developing [CZMA] programs has adequately considered the views of any federal agency, the activities of which would be affected by the state program." H.R. Rep. No. 92-1049, *supra* at 19. By failing to list the leasing of OCS tracts as a federal activity subject to its program, California did not give the notice to Interior that was necessary to precipitate an articulation of that agency's views of this matter.

[34] Having demonstrated that the term "consistent to the maximum extent practicable" as defined by NOAA permits flexibility in interpreting CZMA programs, it is not necessary to argue that this Court would *de novo* construe the term as providing flexibility to

over the OCS and was compelled by the complaint in this case and the district court's judgment to address that issue. Cross-petitoners' insistence here that those aspects of the Ninth Circuit's decision which rejected California's plea for the exercise of final authority over OCS leasing were unripe is thus without foundation. Should this Court affirm the Ninth Circuit's ruling on the "directly affecting" question, it too should address the implications of that ruling as bearing upon the federal paramountcy question.

The application of settled principles of administrative law support the Ninth Circuit's location of "final authority" within the Executive Branch of the federal government, subject to judicial review, to resolve consistency issues. Moreover, a proper respect for Congress' segmentation of the OCS process supports the Ninth Circuit's holding that CZMA consistency at the leasing stage need only set the project on a path capable of achieving consistency at later stages. Finally, nothing in the statute nor NOAA regulations requires a federal

---

federal decision-makers. It is, however, appropriate to note that another court has interpreted the phrase "maximum extent practicable" as providing significant discretion to the Secretary of the Interior in the selection of the timing and location of OCS leasing under Section 18 of the OCSLA, 43 U.S.C. § 1344. *California* v. *Watt*, *supra*, 668 F.2d at 1317:

> "The Act recognized the difficult burden the Secretary must shoulder by stating that the selection of timing and location of leasing must strike the proper balance 'to the maximum extent practicable.' The Secretary must evaluate oil and gas potential, which can be quantified in monetary terms, in conjunction with environmental and social costs, which do not always lend themselves to direct measurement. Because of this, they must be considered in qualitative as well as quantitative terms.
>
> "Although the secretarial discretion we have described is broad, as a result of both the general wording of the statute and the nature of the task Secretary is asked to perform, the Secretary's discretion is not unreviewable."

agency to give conclusive weight to a state CZMA agency's *post hoc* interpretation of its CZMA program. A recognition by this Court of these principles would preserve at least a measure of federal paramountcy over the OCS.

The court should be aware, however, that preserving federal paramountcy through this approach, as opposed to a recognition that Section 307(c)(1) does not apply to the selection of OCS tracts for leasing, leaves open a number of questions that will have to be answered through subsequent litigation: What role is the Department of Commerce to play in resolving consistency disputes and what weight should be given by reviewing courts to its views; to what extent in judicial review proceedings should a court give weight to the views of a state agency as to the interpretation of its program; to what extent can a federal agency claim that it did not receive fair warning at the time of program approval that its activities would be subject to later CZMA scrutiny?

Moreover, even after these legal issues are settled and general principles are evolved, there would remain, as the Ninth Circuit itself foresaw, the task of applying these principles by "examining each situation with care and sensitivity to the concerns of the state and nation." (24a). Such an examination would, of course, have to be conducted by a federal court in litigation initiated by coastal states complaining of OCS leasing off their shores.

The future litigation created by the Ninth Circuit's interpretation of Section 307(c)(1) confirms the words of the court which upheld the CCMP, while describing the CZMA and its administrative scheme as leading inevitably to a "morass of problems." (WOGA Br. 45). WOGA submits that Congress could not possibly have meant to subject the selection of OCS tracts for leasing to this

scheme, when it said nothing in passing or amending the CZMA that in any way indicated that it intended to repeal the clearly delineated lines described in the OCSLA and in the Submerged Lands Act concerning proprietary control over the OCS.

Thus, our defense of that part of the Ninth Circuit's ruling which cross-petitioners attack here leads us to reiterate that the selection of OCS tracts for leasing should be held by this Court not to be a federal activity "directly affecting" the coastal zone within the meaning of Section 307(c)(1) of the CZMA.

Respectfully submitted.

HOWARD J. PRIVETT
DONNA R. BLACK
MCCUTCHEN, BLACK,
VERLEGER & SHEA
600 Wilshire Boulevard
Los Angeles, CA 90017
(213) 624-4200

E. EDWARD BRUCE*
BOBBY R. BURCHFIELD
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Post Office Box 7566
Washington, D.C. 20044
(202) 662-6000

Attorneys for
WESTERN OIL & GAS ASSOCIATION, *et al.*

*Counsel of Record

Of Counsel:

AMOCO PRODUCTION COMPANY
Donald J. Brannan

ATLANTIC RICHFIELD COMPANY
James R. Coffee

CHAMPLIN REFINING CO.
J. D. Henry

CONOCO INC.
Stephen L. Baker

ELF AQUITAINE OIL & GAS CO.
Ted G. White

EXXON CORPORATION
Melinda F. Harmon

GETTY OIL COMPANY
Cloy D. Monzingo

GULF OIL CORPORATION
Kenneth M. Brown

PHILLIPS PETROLEUM COMPANY
Thomas M. Blume

SHELL OIL COMPANY
Donald F. Gallion